No. 88-1685

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In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In our petition in this case, we explained that the court of appeals erroneously rejected the no-presumption rule adopted by the Board for evaluating the extent to which striker replacements support the incumbent union. We also noted, as had three Members of this Court in *Pennco, Inc.* v. *NLRB*, 459 U.S. 994 (1982) (White, J., dissenting), that the circuits are divided on the question whether, and to what extent, presumptions are appropriate in assessing the union sentiments of striker replacements.

On these central points, respondent takes no issue with us. It acknowledges that "the courts of appeals have inconsistently resolved similar issues," adopting "different measures to ascertain the reasonableness of the employer's

doubt" of a union's majority status (Br. in Opp. 23 n.10). And respondent does not dispute the evident reasonableness of the no-presumption rule, as articulated by the Board in *Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988), and as applied by the Board in this case.

Respondent opposes the petition in this case for the sole reason that, in its view, the case is an inappropriate vehicle for resolving the question presented. Citing a litany of factual matters (Br. in Opp. 11-20), respondent contends that it had a sufficient basis for doubting the majority status of the union—wholly apart from whether, pursuant to the "Gorman presumption," the striker replacements must be presumed to oppose the incumbent union. But the court of appeals—whose judgment is at issue in this case—did not rely on any of the factors urged by respondent. Rather, the court below denied enforcement because, as the court put it, "[w]here such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (Pet. App. 10a).

The case, in short, was decided entirely on the strength of the Gorman presumption. As Judge Williams noted in dissent, "[t]he outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike" (Pet. App. 12a). Thus, while the factual matters raised by respondent may be relevant to a disposition by the court of appeals on remand from this Court, they do not constitute a basis for opposing further review of the question presented.

Finally, we note that two court of appeals decisions issued since our petition was filed have intensified still further the conflict among the circuits. In *Hajoca Corp.* v. *NLRB*, No. 88-3707 (Apr. 26, 1989), the Third Circuit, noting the inter-circuit conflict (see slip op. 9-10), approved the Board's no-presumption rule on the ground that it made "eminent good sense" and could not "be deemed irrational or inconsistent with the Act" (*id.* at 11). In doing so, that court expressly rejected the approach of the Fifth Circuit in the present case. The Third Circuit explained that the Fifth Circuit's standard "directly conflicts with the employer's burden of showing its good faith doubt by objective evidence," ignores the fact that replacements "may cross picket lines * * * not out of opposition to unions but due to economic necessities," and "simply lacks empirical support" (*id.* at 10).

Similarly, in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (1989), the Eleventh Circuit, also noting the conflict among the circuits (see *id.* at 989-991), approved the Board's requirement that an employer show " 'some further evidence of union non-support' in order to count replacements as employees whom the company doubts support the Union" (*id.* at 991-992). Although, on the facts of the case, the court refused to enforce the Board's order, the court rejected the Gorman presumption (*id.* at 991) and criticized the reasoning adopted by the Fifth Circuit in the present case (see *ibid.*).*

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* Since the filing of the petition, the Second Circuit has reaffirmed its approval of the no-presumption rule, explaining that it "has never been comfortable either with the presumption that replacement workers support the union or with the presumption that they oppose it." *Proxy Communications of Manhattan, Inc.* v. *NLRB*, No. 88-4140 (Apr. 14, 1989), slip op. 2735 n.2.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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